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Special Master George Finkle

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application  
regarding the Conversion and  
Acquisition of Control of Premera Blue  
Cross and its Affiliates.

No. G 02-45

PREMERA'S RESPONSE TO WSMA'S  
REPLY RE DISCLOSURE OF AEO  
MATERIALS TO WSMA'S EXPERTS

In its Reply Brief, the Washington State Medical Association ("WSMA") has once again only provided unsupported assertions by its attorneys in place of any evidence establishing its position. Moreover, the Reply Brief does not advance the arguments regarding the motion in any material way.

1. It's true that Premera does not question that the two gentlemen are trustworthy individuals. But no one can look at Attorneys' Eyes Only ("AEO") Material and not have it have an impact, consciously or subconsciously, on one's analysis and on the actions that one takes or decides not to take.

To just give a few examples: Dr. Collins, as an individual physician, as a member of his group, and as a leader of his organization, will face many situations in which his knowledge of Premera's AEO Materials will inevitably give him an advantage in assessing what Premera's bottom line position -- as opposed to its bargaining position -- in a given matter is. So too with Mr. Perna, whose very job is to report to WSMA's

PREMERA'S RESPONSE TO WSMA'S REPLY RE  
DISCLOSURE OF AEO MATERIALS TO WSMA'S  
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1 members on what is and is not important about an initiative or other action that Premera  
2 has announced. When asked to opine as to what Premera is or is not likely to do in the  
3 upcoming year in any particular area, how can Dr. Collins's and Mr. Perna's answers not  
4 be informed -- and tainted -- by having in their heads crucial information about  
5 Premera's finances, operational plans and business plans?

6         2.       The answer to WSMA's rhetorical question -- will its experts be allowed  
7 to view AEO information about the Conversion -- is: yes, so long as they are not officers  
8 or employees or otherwise connected to WSMA.

9         3.       Now is not the time to argue about whether Premera's use of the AEO  
10 designation is correct. But, to the extent that any of the AEO Materials have already  
11 appeared on Premera's web site, Dr. Collins and Mr. Perna presumably have already had a  
12 chance to look at such materials.

13         4.       After all is said and done, the Commissioner's Fourth Order still clearly  
14 limits the scope of what WSMA's contribution will be at the Hearing. However, the  
15 Special Master and Premera continue to be in the dark as to how any of the AEO  
16 Materials in the OIC Staff Consultant Reports are relevant to, or needed for, Dr. Collins  
17 and Mr. Perna to prepare their reports.

18         5.       "Take it or leave it" is an inflammatory, and inaccurate, way to describe  
19 what Premera does in rolling out its proposed fee schedules to its providers. In fact, that  
20 rollout actually illustrates how access to Premera's AEO Materials will inevitably be used.  
21 One can see Dr. Collins and Mr. Perna at those rollout meetings asking questions about  
22 the need for a particular fee schedule, which questions are informed, for example, by their  
23 knowledge of what Premera's target margin rates are as a result of their having seen those  
24 rates in an AEO document.

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PREMERA'S RESPONSE TO WSMA'S REPLY RE  
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1           6.       If Dr. Collins can attest to the impact Premera's acquisition of MSC has  
2 had in Eastern Washington, that makes him a fact witness, with anecdotal information, but  
3 it does not make him an anti-trust expert. And it also demonstrates why it would be  
4 inappropriate for him to have access to Premera's AEO Materials.

5           7.       WSMA's attorneys do have access to the AEO Materials. Armed with that  
6 information, they can cross-examine expert and lay witnesses, thereby representing the  
7 interests of their client. But the assertion that WSMA cannot afford to hire an expert,  
8 even if true, does not justify the attorneys being authorized to give AEO Materials to their  
9 client's officers and employees.

10          8.       Dr. Collins and Mr. Perna can submit their expert reports on November  
11 10<sup>th</sup>. They just can't look at AEO Materials in preparing those reports.

12          9.       WSMA's attorneys should have known for months that Premera would  
13 object to having WSMA's officers and employees look at AEO Materials -- why else  
14 would Premera have insisted on an AEO provision? The Protective Order was entered on  
15 June 13<sup>th</sup>. WSMA attorneys were on notice by that date that they might well need to have  
16 this issue decided by the Special Master and/or the Commissioner. They should have  
17 revealed their plan to designate Dr. Collins and Mr. Perna early, so that there would have  
18 been plenty of time to litigate the issue. Instead, they chose to wait until the last minute.  
19 They cannot now be heard to argue that they should be given more time to turn in their  
20 reports.

21          10.      It appears to Premera that WSMA declined the Special Master's offer to  
22 permit it to renew, in its Reply Brief, its objections to Premera's Second Set of Discovery  
23 Requests.

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PREMERA'S RESPONSE TO WSMA'S REPLY RE  
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1 But if a passing reference to its previous brief counts as a renewal by WSMA of its  
2 objections to some of the requests in Premera's Second Set, then Premera has the  
3 following arguments in response:

4 (a) WSMA objected to that portion of Request No. 8 that asks for all documents,  
5 from January 1, 1999 to the present regarding income reported to the IRS by Dr. Collins  
6 and by the physicians in his group. This meets the test for discovery: it is reasonably  
7 calculated to lead to the discovery of admissible evidence. If Dr. Collins is going to  
8 testify that Premera's reimbursement levels would be changed after conversion, then it is  
9 fair to ask how, if at all, such levels of reimbursement actually affect him and his group  
10 now, so that we have a basis for ascertaining how they might affect them after a  
11 conversion. If Dr. Collins wants to mark his tax returns "AEO," so that Premera and the  
12 Hospital Association personnel don't see them, that's fine with Premera.

13 (b) WSMA also objects to that portion of Request No. 11 that asks for  
14 communications between WSMA's lawyers and its expert Mr. Perna. But one of the  
15 consequences of identifying a client's representative such as Mr. Perna as a testifying  
16 expert is that there is no attorney-client privilege between an attorney and his experts.  
17 Hence, any communications between an attorney and Mr. Perna (or Dr. Collins) should be  
18 deemed waived by the designation of each of these individuals as experts. Moreover, the  
19 courts have recognized that the work product protection does not apply to  
20 communications between an attorney and his experts, once those experts have been  
21 designated as testifying experts. Rather, the opponent is entitled to explore all of the  
22 information that was provided to the expert. See *Beverage Mktg. Corp. v. Ogilvy &*  
23 *Mather Direct Response, Inc.*, 563 F. Supp. 1013 (S.D.N.Y. 1983) (work product rule  
24 does not apply to experts who are expected to testify); *Boring v. Keller*, 97 FRD 404, 407  
25 (D Colo 1983) (same). In this case, because WSMA is taking the highly unusual step of

PREMERA'S RESPONSE TO WSMA'S REPLY RE  
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1 designating the client's officer and employee as experts, all communications between the  
2 lawyers and the officer or employee must be disclosed.

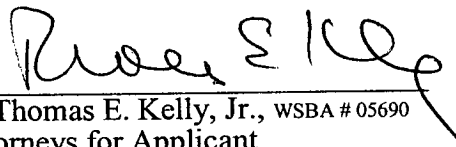
3 (c) The third and final objection to Premera's Second Set is in regard to that  
4 portion of Request No. 8 that asks for documents regarding all communications that Dr.  
5 Collins had with American Medical Association representatives. This request is relevant  
6 to ascertain what Dr. Collins may have said to others about reimbursement levels, either  
7 now or after a conversion by Premera, both for the substantive evidentiary value of those  
8 communications and as possible impeachment of him at the Hearing. WSMA's objection  
9 is that such a request is "onerous," but no further explanation is given. Does Dr. Collins  
10 have so great a volume of communications with AMA representatives that it would be  
11 onerous for him to gather it together? Or to copy it? We find the former hard to credit  
12 and would be willing to look at these documents before determining whether they need to  
13 be copied.

14 CONCLUSION

15 Dr. Collins and Mr. Perna should not have access to Premera's AEO Materials,  
16 any more than Premera's CEO and its chief economist should have access to WSMA's  
17 AEO Materials or to Dr. Collins' AEO Materials about his practice. WSMA's motion  
18 should be denied.

19 DATED this 4<sup>th</sup> day of November, 2003.

20 PRESTON GATES & ELLIS LLP

21  
22 By   
23 Thomas E. Kelly, Jr., WSBA # 05690  
24 Attorneys for Applicant  
25 PREMERA and Premera Blue Cross

PREMERA'S RESPONSE TO WSMA'S REPLY RE  
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